DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER:
Special Fuel Tax 00-0382
For Years 1995, 1996, AND 1997

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ISSUES

I. Special Fuel Tax – Import of Fuel to Indiana

Authority: SF10-A; IC § 6-6-2.5-35

Taxpayer protests an assessment based on its out of state sale of fuel for import to Indiana.

II. Special Fuel Tax – Export Exemption

Authority: IC § 6-6-2.5-28; IC § 6-6-2.5-30; IC § 6-6-2.5-40; IC § 6-6-2.5-57; IC § 6-8.1-5-1; IC § 6-8.1-5-4; *Keller Oil Co. v. Indiana Dept of Revenue*, 512 N.E.2d 501 (Ind. Tax 1987)

Taxpayer protests an assessment of tax on fuel that may have been exported.

III. Special Fuel Tax – Dyed Fuel Deliveries

Taxpayer protests assessments of tax on certain dyed fuel deliveries.

IV. Special Fuel Tax – Transmix Fuel Transfer

Authority: IC § 6-6-2.5-30

Taxpayer protests denial of a deduction for fuel transferred to another company.

V. Special Fuel Tax – Exchange

Taxpayer protests disallowed exchange volume.

VI. Special Fuel Tax – Dyed Fuel

Taxpayer protests assessments of tax based on the Department's determination that tax on dyed fuel was not remitted to the state.

VII. Special Fuel Tax – Debit/Credit Entries

Taxpayer protests an adjustment based on erroneously generated invoices.

STATEMENT OF FACTS

Taxpayer, an international wholesale distributor of fuel with terminals in Indiana, sells fuel for use within and outside of the state.

I. Special Fuel Tax – Wholesale ID

DISCUSSION

Taxpayer protests an adjustment that included in the tax base special fuel that was withdrawn by taxpayer customers from terminals outside of Indiana and was then taken into Indiana by taxpayer's customers. Taxpayer argues that the audit report predicates taxpayer's duty to collect Indiana special fuel tax on an agreement by taxpayer to collect that tax. The SF10-A form signed and referenced by taxpayer states in relevant part that taxpayer:

> Agree[s] to treat all out-of-state terminal removals of undyed special fuel, for export into Indiana, as if they were received in Indiana, and collect the Indiana special fuel tax from every purchaser.

And, as part of the explanation of this form that was cited by taxpayer as the basis for taxpayer's protest:

> Option One: Elect the 'blanket' option. Under this option, the S/PS will continue to collect Indiana special fuel tax due on import sales into Indiana in the same manner which they have prior to July 1 [1994]. This alleviates administrative requirements, notice requirements, and reporting changes which are required under Option Two or Three.

This taxpayer signed this pursuant to IC § 6-6-2.5-35(j), which stated at the time of taxpayer's signing:

> (j) The department, a licensed importer, the reseller to a licensed importer, and a licensed supplier or permissive supplier may jointly enter into an agreement for the licensed supplier or permissive supplier to precollect and remit the tax imposed by this chapter with respect to special fuel imported from a terminal outside of Indiana in the same manner and at the same time as the tax would arise and be paid under this chapter if the special fuel had been received by the licensed supplier or permissive supplier at a terminal in Indiana. If the supplier is also the importer, the agreement shall be entered into between the supplier and the department. However, any licensed supplier or permissive supplier may make an election with the department to treat all out-of-state terminal removals with an

> Indiana destination as shown on the terminal-issued shipping paper as if the removals were received by the supplier in Indiana pursuant to sections 28 and 35(a) of this chapter, for all purposes. In this case, the election and notice of the election to a supplier's customers shall operate instead of a three- (3) party precollection agreement. The department may impose requirements reasonably necessary for the enforcement of this subsection.

IC § 6-6-2.5-35(j) is explicit as it regards the effect of an election. It states in relevant part "any licensed supplier or permissive supplier may make an election with the department to treat all out-of-state terminal removals with an Indiana destination as shown on the terminal-issued shipping paper *as if the removals were received by the supplier in Indiana pursuant to sections 28 and 35(a) of this chapter, for all purposes."* Id *(emphasis added)* When a licensed or permissive supplier makes such an election, it also consents to the liability and duties that IC § 6-6-2.5-28 and 35(a) specify upon a receipt of special fuel. Thus, a licensed or permissive supplier that makes an election under IC § 6-6-2.5-35(j) thereby consents to the imposition of special fuel tax pursuant to IC § 6-6-2.5-28 upon the removal of special fuel from an out-of-state terminal shown as being destined for Indiana. It also makes itself liable for the tax on that fuel as the receiving supplier and assumes duties to invoice, precollect, and remit Indiana special fuel tax on the gallons it has so received- all of these taxpayer responsibilities paralleling taxpayer responsibilities at instate terminals.

Taxpayer does not provide an explanation or attempt to reconcile the cited language of SF10-A or IC § 6-6-2.5-35(j), merely noting that it interpreted the SF10-A as not requiring any reporting or collection on the taxpayer's part. Taxpayer is correct in stating that it is not *required* to collect the tax, however taxpayer's out-of-state terminal was never *required* to pay this tax. Taxpayer collected this tax on behalf of buyers intending to deliver the fuel to Indiana and not wishing to pay the resident state's fuel tax. If taxpayer did not permit the buyers this option, the buyer's, being under the resident state's jurisdiction, would have been required to pay the resident state's fuel tax; then Indiana's fuel tax, then seek a refund from the resident state. For either compassionate or commercially competitive reasons, the taxpayer has opted to collect and forward the Indiana tax from the resident state's refinery. Indeed, taxpayer's desire to continue this practice prompted taxpayer to not select option C on the SF10A form- the option not to collect Indiana fuel tax at this location.

Even the SF10-A explanation cited by the taxpayer in support of its argument states taxpayer, "… will *continue to collect* Indiana special fuel tax due… This alleviates administrative requirements, notice requirements, and *reporting changes* which are required under Option Two or Three" *(Emphasis added*) Taxpayer is an international wholesale distributor of fuel, for taxpayer to suggest it was lulled into complacency by the explanation of an option on a form, where said explanation clearly states an activity (the collection and reporting of Indiana fuel tax at the out-of-state terminal) already has and does exist and which is merely an explanation of an option that explicitly declares a resolve on taxpayers part to "collect the Indiana special fuel tax from every purchaser," is disingenuous at best. Taxpayer states no statutory basis for a reversal of this adjustment, nor does taxpayer explain its reluctance to select the "no tax" option on the form in question. Taxpayer protest is denied.

FINDINGS

Taxpayer protest denied.

II. Special Fuel Tax – Export Exemption

DISCUSSION

This concerns FOB Indiana sales. These sales were reported on taxpayer's returns as export sales. According to the auditor, all sales from a taxpayer's origin code to a customer with an Indiana Wholesale Identification Code (WIC number) were considered in-state sales and included as disallowed exports for this adjustment. In all cases, taxpayer maintains that these were export sales. Taxpayer argues that it has proof that falls into two general categories. The first is other information on the bill of lading, specifically, a stated destination, and a signed receipt at that location by the recipient. The second method was to get information from the customer and the customer's Indiana return showing that the shipment received from taxpayer was reported on taxpayer's customer's return as an export and was accepted as such on audit by the Indiana Department of Revenue. According to the taxpayer, some of its customer's out-of-state returns were also requested and the shipments reported by taxpayer as exports were purportedly traced to those returns.

The Special Fuel Tax in question is imposed by IC § 6-6-2.5-28, which instructs:

> (a) A license tax of sixteen cents ($0.16) per gallon is imposed on all special fuel sold or used in producing or generating power for propelling motor vehicles except fuel used under section 30(a)(8) of this chapter. The tax shall be paid at those times in the manner, and by those persons specified in this section and section 35 of this chapter.
>
> (b) The department shall consider it a rebuttable presumption that all undyed or unmarked special fuel, or both, received in Indiana is to be sold for use in propelling motor vehicles.

IC § 6-6-2.5-30 states:

> (a) The following are exempt from the special fuel tax:
> (1) Special fuel sold by a supplier to a licensed exporter for export from Indiana to another state or country to which the exporter is specifically licensed to export exports by a supplier, or exports for which the destination state special fuel tax has been paid to the supplier and proof of export is available in the form of a destination state bill of lading.

IC § 6-6-2.5-40(a) states in relevant part:

> Each person operating a refinery, terminal, or bulk plant in Indiana shall prepare and provide to the driver of every vehicle receiving special fuel at the facility a shipping document setting out on its face the destination state as represented to the terminal

> operator by the shipper or the shipper's agent, except that an operator of a bulk plant in Indiana delivering special fuel into a vehicle with a capacity of not more than five thousand four hundred (5,400) gallons for subsequent delivery to an end consumer in Indiana is exempt from this requirement.

Additionally IC § 6-6-2.5-57 states:

> (a) Each person operating a terminal in Indiana shall file monthly reports of operations within Indiana on forms prescribed by the department. The department may require the reporting of any information it considers reasonably necessary.
>
> (b) For purposes of reporting and determining tax liability under this chapter, every licensee shall maintain inventory records as required by the department.

Additionally, the Indiana Tax court has held in its denial of a petition to enjoin collection of the Special Fuel Tax the following:

> IND. CODE 6-8.1-5-4(a) requires persons such as the Petitioners to keep adequate records. Since it appears that Petitioner has not kept adequate records and since IC 6-8.1-5-1(a) permits the Respondent to use the best information available to calculate the tax liability, it does not appear that Petitioner has a reasonable opportunity to prevail in the original tax appeal issue. *Keller Oil Co. v. Indiana Dept of Revenue,* 512 N.E.2d 501 (Ind. Tax 1987) at 504

Taxpayer alleges that it can demonstrate that sales were to eleven customers in the stated amounts below and accounted for as follows:

Customer 1

> Customer's Illinois tax returns for 1995 and 1996 show the shipments reported by taxpayer as exports to have been delivered in, and reported to, Illinois. Taxpayer does not have access to customer's Illinois returns for 1997, but are pursuing alternative methods of verification.

Customer 2

> Taxpayer acquired from the customer copies of the bills of lading, which indicate the destination and receipt at that destination of shipments of fuel.

Customer 3

> Customer has furnished its tax returns for the period indicating that all purchases from Shell were exported. Additionally, the customer was audited for the period 1994-96 by the State of Indiana with no assessment resulting.

Customer 4

> Customer reported that they were audited for the period by the State of Indiana. Exports were reported on the returns and were verified in the audit. Customer doesn't want to

provide sales documentation or returns because they contain proprietary customer information. Customer provided an audit summary for the period.

Customer 5

Customer advised that the product was not exported and that Shell did not bill them for the tax.

Customer 6

Customer lost records.

Customer 7

Customer purchased by new entity -- No records available.

Customer 8

Customer exported the product. Copies of invoices provided.

Customer 9

Customer exported the product. Copies of the returns provided.

Customer 10

Customer exported the product. Copies of the returns provided.

Customer 11

Customer purchased by new entity– No records available.

The Department requested Bills of Lading on 5/21/98, 7/1/98, 11/17/98 (Information Document Requested forms for above dates in audit file) as well as an Auditor list requesting the documentation from April of 1999 and a 30 day notice from the Auditor in February of 2000 prior to this assessment being made. These forms have not been provided by taxpayer. Inasmuch as the transactions may-or may not- have been for export, the statutory language and its interpretation are unambiguous: Taxpayer **"**shall maintain inventory records as required by the department," (IC § 6-6-2.5-57). The Tax Court, in denying an order to enjoin collection of tax pending, states "…it appears that Petitioner has not kept adequate records and since IC 6-8.1-5-1(a) permits the Respondent to use the best information available to calculate the tax liability, it does not appear that Petitioner has a reasonable opportunity to prevail in the original tax appeal issue." *Keller Oil Co. v. Indiana Dept of Revenue,* 512 N.E.2d 501 (Ind. Tax 1987) at 504.

The statutory framework is crafted to provide a comprehensive accounting of fuel transactions across multiple taxpayers and innumerable transactions, thus minimizing the possibility of omissions such as occurred here. Taxpayer, in complete disregard of this framework, protests that the ad-hoc, self-selected documentation submitted should suffice to demonstrate that these transactions were not taxable. Taxpayer now invites the Department to disregard statutorily required documentation and procedures for claiming the export exemption. The Department respectfully declines.

FINDINGS

Taxpayer protest denied.

III. Special Fuel Tax – Dyed Fuel Deliveries

DISCUSSION

Taxpayer noted that some deliveries of dyed diesel fuel were not clearly reported as such and tax was assessed on them as subject to the special fuel tax. Taxpayer, however, has failed to submit documentation to support this contention. Absent such documentation, the protest cannot be sustained.

FINDINGS

Taxpayer protest denied.

IV. Special Fuel Tax – Transmix Fuel Transfer

DISCUSSION

Audit disallowed deductions of transmix fuel (fuel used as a buffer between grades of fuel in pipeline shipments) that was transferred by taxpayer to another company. Documentation was not provided at the time of audit. Taxpayer is offering to provide documentation, as required by IC § 6-6-2.5-30(a) (10). Absent the presentation of this documentation this protest cannot be sustained.

FINDINGS

Taxpayer protest denied.

V. Special Fuel Tax – Exchange

DISCUSSION

Taxpayer protests the disallowance of part of its exchange volume total. Taxpayer's customer reported fewer gallons received than Taxpayer reported delivered. This involves a dispute between the supplier (Taxpayer) and customer, inasmuch as both parties need to have their records in accord for Taxpayer to receive the credit. If taxpayer believes the customer has failed to correctly report the number of gallons, taxpayer's remedy lies with the customer, not the state. This (a tax appeal) forum exists to resolve a dispute between Taxpayer and the Department, and has no power over a third party's reporting in a transaction of this type.

FINDINGS

Taxpayer protest denied.

VI. Special Fuel Tax – Dyed Fuel

DISCUSSION

Special Fuel Tax was assessed on dyed fuel and not remitted to the State. Taxpayer concedes issue.

FINDINGS

Taxpayer protest withdrawn.

VII. Special Fuel Tax – Debit/Credit Entries

DISCUSSION

Taxpayer protests adjustments made by the auditor that are attributable to erroneously generated invoices. Taxpayer maintains that when an invoice was generated a document was produced, when the correction was made there was a correcting entry on the books, but no document was generated. The auditor picked up the invoices but did not pick up the correcting entries. Exclusion of adjusting entries would be inappropriate, therefore to the extent the adjustments were made, credit will be given.

FINDINGS

Taxpayer protest sustained.

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